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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

Thomas H. Oehmke
Petitioner

vs.

Terry L. Freed
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW [1]

Whether the District Court clearly erred when it refused to enforce (under 9 USC §2) a material condition (*e.g.*, the "award due date") of the parties' arbitration submission agreement (which had been adopted as an Order of the Court) and, instead, as a *matter of law* and unilaterally, extended the contractually-agreed award due date indefinitely?

Whether the District Court clearly erred when it refused Petitioner's suggestion of a trial (under 9 USC §4) to determine whether or not Petitioner had contracted to arbitrate *after the award deadline had expired*?

Whether the District Court clearly erred by not vacating the arbitration award (under 9 USC §10(d)) when the award was rendered 163 days *after* the parties' contractually-agreed award due date had expired?

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[1] All parties to this case are indicated in the caption.

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1. REFERENCE TO REPORTS

There are no official or unofficial reports of any opinions delivered in the courts, nor any administrative agency, below.

2. GROUNDS TO INVOKE JURISDICTION

2.1. Date of Judgment

The date of the judgment of the U.S. District Court to be reviewed is 10 December 1990.

2.2. Date of Order on Rehearing

Rehearing *en banc* was denied on 27 January 1992 by the Sixth Circuit Court of Appeals.

2.3. Statutory Provision

The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is 9 USC §1 *et seq.*

3. LAW INVOLVED IN THIS CASE

3.1. Statutes

The statutes which this case involves are the following provisions of the United States Arbitration Act.[2]

(a) 9 USC §2

§2. Validity, irrevocability, and enforcement of agreements to arbitrate. A written provision in any ... transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or *an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract* [emphasis added].

(b) 9 USC §3

§3. Stay of proceedings where issue therein referable to arbitration. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceedings is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had *in accordance with the terms of the agreement*, providing the

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[2] 9 USC §1 *et seq.*

applicant for the stay in not in default in proceeding with such arbitration [emphasis added].

(c) 9 USC §4

§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination. A party aggrieved by the alleged failure, neglect, or refusal or another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action ... of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed *in the manner provided for in such agreement*. Five days' notice in writing of such application shall be served upon the party in default. ***

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement.* ***

If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default ..., the court shall hear and determine such issue. *** If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there

is default in proceeding thereunder, *the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof* [emphasis added].

(d) 9 USC §5

§5. Appointment of arbitrators or umpire. If in the agreement provision be made for a method of naming or appointing an arbitrator..., such method shall be followed; but if ... a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator..., or in filling a vacancy, then upon application of either party to the controversy the court shall designate and appoint an arbitrator..., who shall act *under the said agreement* with the same for and effect as if he ... had been specifically named therein... [emphasis added].

(e) 9 USC §6

§6. Application heard as motion. Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

(f) 9 USC §10

§10. Award of arbitrators; vacation; grounds; rehearing. In either of the following cases, the United States court in and for the district wherein the award was made may make an order vacating the award upon application of any party to the arbitration -- ***

(d) *Where the arbitrators exceeded their powers*, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated *and the time within which the agreement required the award to be made has not expired* the court may, in its discretion, direct a rehearing by the arbitrators.

4. STATEMENT OF THE CASE

This Court should allow the Writ of Certiorari to promote arbitration and encourage alternative dispute resolution methods to federal court litigation.

4.1. Award Due Date is Contractual

The parties were scheduled with certainty to commence a federal trial during the week of 8 January 1990.

Rather than litigate a complex legal malpractice matter to a federal court jury, several days before the firm trial date, the Court suggested and the parties stipulated to contractually remove the matter from the federal court's jurisdiction and arbitrate the dispute under the United States Arbitration Act.[3]

4.2. Privacy, Economy Speed

The three tenants of arbitration are *privacy, economy, and speed.* In the case at bar, the parties' submission agreement (adopted as the District Court's Order dated 16 January 1990) provided for:

- ✓ *Privacy* by arbitration rather than public litigating.
- ✓ *Economy* by two hearing days, one day for each party.
- ✓ *Speed* by setting an award deadline date of February 28th -- 51 days after the January 8th arbitration referral order.

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[3] 9 USC §1 *et seq.*

During the 51 days after the initial January 8th arbitration referral Order and before the February 28th award deadline, there were 35 full calendar days when all three required arbitrators were appointed, in place, able and available to arbitrate.

During these 35 calendar days, only two days were needed to hold this arbitration hearing. Yet, not one day of hearing was ever scheduled (let alone conducted) during this contractually-allocated, 51 day, Court-approved "window of opportunity." Indeed, the arbitral panel did not issue its award until August 10th -- nearly six months after the contractually-imposed deadline.

4.3. Parties Bargained Award Due Date

The Sixth Circuit panel overlooked or misapprehended the contractual significance of the parties' stipulation and Order (modifying the District Court's arbitration referral Order). That initial January 8, 1990 referral "order said that the arbitration hearing would be held *no later than January 30*, and that the arbitrator's decision would be issued no later than February 28, 1990."[4]

In point of fact, the parties contractually-negotiated the terms of a stipulation and Order (adopted as an Order of the District Court). This subsequent Order constituted the operative arbitration submission agreement; it contractually-extended the January 30 deadline date for conducting the arbitration hearing and, instead, substituted *a contractually-imposed award due date -- superseding the District Court's prior referral Order -- which thereafter contractually-*

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[4] Sixth Circuit Opinion, p. 2.

required "that the arbitrator's decision would be issued no later then February 28, 1990."

Arbitration proceeded under the express terms of a written arbitration submission agreement -- adopted as an Order of the Court -- which agreement included the express provision that a final and binding arbitration award *must be rendered before 28 February 1990.*

4.4. Time was "Of the Essence"

A tripartite arbitral panel was fully in place for a total of 35 days (during the 51 day arbitral period); however, no arbitration hearings were scheduled or held. There is no doubt why the District Court below held there was no material delay attributable to either party.

Yet, Respondent never initiated discussions with Petitioner in an attempt to extend the arbitration award due date. Neither did Respondent, as the "aggrieved party," ever move to compel arbitration, a motion that was available under the federal Arbitration Act -- on five days' notice.[5]

The panel overlooked or misapprehended the facts and the significance of the party-negotiated arbitration submission agreement (adopted by the District Court as it own Order dated 16 January 1990) when the Sixth Circuit held that this "arbitration agreement did not provide that *time was of the essence....*"[6]

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[5] 9 USC §4.

[6] Sixth Circuit Opinion, p. 3.

In point of fact, time was of the essence according the two items within the four corners of the arbitration submission agreement:[7]

- Two days maximum were allowed within which to conduct the arbitration hearing -- one day for each side; and,

- A clear and unequivocal award deadline was established as of a date certain -- February 28th.

Furthermore, when the District Court encouraged the parties to arbitrate, the trial judge "emphasized that the arbitration would be conducted on an *expedited basis, which would save time and money.*"[8]

4.5. Petitioner Adhered to Deadline

When the arbitration award due date (of 28 February 1990) arrived, Petitioner immediately notified the arbitration panel in writing not to proceed (because the arbitrators' would be exceeding their contractually-granted powers, giving grounds to vacate any award under the federal Arbitration Act).[9]

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[7] Joint Appendix, Sixth Circuit, pp. 67-70.

[8] Sixth Circuit Opinion, p. 2.

[9] 9 USC §10(d).

After notifying the arbitrators not to proceed, Petitioner immediately moved to stay arbitration under the federal Arbitration Act.[10]

In denying Petitioner's motion for a stay, the District Court clearly erred when it disregarded Petitioner's suggestion of a trial[11] to determine if the parties' had agreed to arbitrate once the award deadline had expired. Instead, the District Court, upon a motion rather than after trial, erroneously decided -- *as a matter of law* -- that the award due date was not a material term of the arbitration agreement, erroneously ordering arbitration to proceed *after the award deadline date had passed.*

Petitioner thereafter participated in the arbitration process under protest, having raised and asserted a continuing objection (which was noted first by the Court on the record and, second, by the arbitrators on the record at the commencement of the arbitration hearing).

4.6. Award was Six Months Late

The Sixth Circuit panel overlooked or misapprehended the facts when it stated that the arbitration "award was not made until *some months* after a deadline set by the District Court and agreed to by the parties."[12]

In point of fact, the arbitration award was not rendered until *more than 163 days -- or nearly six months* --

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[10] 9 USC § 4.

[11] Available under 9 USC §4.

[12] Sixth Circuit Opinion, p. 1.

after the award due date had expired, even though contractually-negotiated by the parties and adopted by the trial court as an order.

4.7. Review of Federal Court Judgment

The basis for federal jurisdiction in the first instance was diversity of citizenship, an amount in controversy above the federal limit, and a federal question under the federal Arbitration Act.[13]

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[13] 9 USC §1 *et seq.*

5. ARGUMENT

The following direct and concise argument is made amplifying the reasons relied on for the allowance of the writ.

No doubt, a review on writ of certiorari is not a matter of right, but of judicial discretion; however, a writ should be granted here because there are special and important reasons.

The concept of arbitration award due dates, or contractually-negotiated deadlines, is recognized in the federal Arbitration Act. By analogy, the U.S. Code allows a district judge to vacate an arbitration award and, thereafter...

> Where an award is vacated *and the time within which the agreement required the award to be made has not expired* the court may, in its discretion, direct a rehearing by the arbitrators.[14]

It is this codification by Congress in the federal Arbitration Act which recognizes the contractual-sanctity of the arbitration award due date.

In the case at bar, however, the District Court *unilaterally* altered a material term of the parties' contract: not only did the District Judge revoke the contractually-agreed award deadline date, but *the court directed a hearing*

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[14] 9 USC §10(e).

by the arbitrators after "...the time within which the agreement required the award to be made..." had expired!

5.1. CONFLICTING DECISIONS

The Sixth Circuit Court of Appeals has rendered a decision in conflict with previously-decided cased in the Second and Seventh Circuit Courts of Appeals on the same matter.

(a) 2nd Circuit Conflict

In conflict with this Sixth Circuit decision, the Second U.S. Circuit Court of Appeals would have vacated this arbitration award based on any of three relatively recent Second Circuit cases.

EXAMPLE #1: In *Koch*, the Second Circuit observed that an arbitrator's decision **must** be made within a reasonable time. The Second Circuit held that a delay in an arbitrator's decision will invalidate the award when it constitutes a cognizable breach of the governing arbitration rules and one party objects to delay during the proceedings.[15]

EXAMPLE #2: In *Government of India*, the Second Circuit upheld the validity of an arbitration award ... *but only because* it was filed prior to expiration of arbitrators'

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[15] *Koch Oil, S.A. v Transocean Gulf Oil Co.* (1985, CA2 NY), 751 F 2d 551.

authority under arbitration agreement.[16] To the contrary here, the award deadline had already expired *nearly six months before* the award was rendered.

EXAMPLE #3: In *La Societe*, the Second Circuit commented on the concept of waiver in the context of an arbitration award due date. An employer moved to vacate an arbitration award because the arbitrators lacked jurisdiction. The arbitrator requested the employer to extend the due date for rendering the award. The employer waived any objection to the untimely award by failing to respond to the requested due date extension.[17]

Uniformly, the Circuits have held that a party -- as is the case here -- must complain about delay *before an arbitration award is made*, or else the non-complainer forfeits any right to challenge the timeliness of an award.[18]

In the instant case, there was no waiver of the right to complain of delay. For example, when Respondent requested 16 days advanced notice before the scheduling of any hearings, Petitioner protested -- *the same day* -- to

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[16] *Government of India v Cargill* (1989, CA2 NY), 867 F 2d 130.

[17] *La Societe Nationale Pour La Recherche, etc. v Shaheen Natural Resources Co.* (1983, CA2 NY), 733 F 2d 260, *cert den* 469 US 883, 83 L Ed 2d 188, 105 S Ct 251.

[18] *Hill v. Norfolk and Western Ry. Co.*, 814 F.2d 1192 (7th Cir., 1987); *Lodge No. 725 v. Mooney Aircraft, Inc.*, 410 F.2d 681, 683 (5th Cir. 1969); *West Rock Lodge No. 2120 v. Geometric Tool Co.*, 406 F.2d 284, (2d Cir. 1968); *Jones v. St. Louis-San Francisco Ry.*, 728 F.2d 257 (6th Cir.1984).

Respondent's attorney. Petitioner objected to further delay and insisted "that the arbitration ... conclude before the end of [February, 1990], as ordered by the court."[19]

Thus, Petitioner did what the Second Circuit would have him do: Petitioner immediately objected to Respondent's attempt to extend the award due date and object to any proposed delay.[20]

When the arbitration award due date passed, Petitioner moved (under the FAA) to stay arbitration proceedings.

Importantly here, it was Respondent (as the allegedly aggrieved party) who desired a day in court, not Petitioner. It is not Petitioner's duty to prosecute Respondent's case. As plaintiff below, Respondent was the one obliged to move matters along. Instead, Respondent not only sat on his hands but, also, urged a delay at the 11th hour by insisting on "16 or more days of advance notice." In the face of an impending award due date, Respondent failed to act, never moving to compel arbitration.[21] Petitioner cannot be faulted for Respondent's inaction, particularly when a statutory remedy (*e.g.*, motion to compel arbitration) was available.

By Respondent's inaction ... by failing to demand that the arbitrators meet the contractual award due date deadline ... by not moving to compel arbitration as the stroke of

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[19] Sixth Circuit Opinion, p. 2.

[20] Joint Appendix, Sixth Circuit, p. 63.

[21] 9 USC § 4.

midnight drew near ... by insisting on "16 or more days advance notice" ... *Respondent is estopped from denying that time was of the essence.* The verbatim recitation in a contract of these "magic words" -- "time is of the essence" -- is not so magic, particularly in this day of plain English.

Ordinarily, time is not of the essence, unless something in its nature, or connected with its purpose, makes it apparent that parties intended contract to be performed within time specified.[22] In *Texas Eastern Transmission*, the Court opined:

> At law and in equity, the question of whether "time is of the essence" one of construction to be determined by the intent of the parties and time is, ordinarily, not of the essence, unless it is made so by express stipulation, or unless something in its nature, or connected with its purpose, makes it apparent that the parties intended the contract to be performed within the time specified.[23]

In the case before this Court now, the parties provided for a fixed award deadline date and an amazingly abbreviated hearing -- two days maximum, one day for each side.

In any event, whether time was of the essence or not is a question of fact. Both the District Court and the Circuit

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[22] *Texas Eastern Transmission Corporation v. Barnard*, 285 F.2d 536 (6th Cir., 1960).

[23] *Central Contracting Co. et al. v. Grignon*, 255 F. 952 (8th Cir.).

Court panel apparently failed to consider Petitioner's unrebutted evidence that time was of the essence and that delay was prejudicial.[24] Where there is a substantial question of a material fact (*i.e.*, Is time of the essence?), a trial should be held,[25] as Petitioner suggested in his Motion to Stay Arbitration.

(b) 7th Circuit Conflict

In conflict with this Sixth Circuit decision, the Seventh U.S. Circuit Court of Appeals would have vacated this arbitration award based on either of two recent Seventh Circuit cases.

EXAMPLE #1: In *Centor Contractors*,[26] the Seventh Circuit honored a party-imposed "statute of limitations." The parties contracted that any petition to vacate an arbitration award must be filed within 90 days after the award was rendered; the courts honored and enforced the parties' agreement.

EXAMPLE #2: In *King*,[27] the Seventh Circuit considered a delay in the tardy issuance of an appraisal report. In assessing whether time was of the essence, the Seventh Circuit weighed as evidence the behavior of the parties who were facing an arbitration award due date. The Court asked:

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[24] Joint Appendix, Sixth Circuit, pp. 67-70.

[25] 9 USC §4.

[26] *Int'l Union of Operating Engineers, Local 150 v Centor Contractors, Inc.* (1987, CA7 Ill), 831 F 2d 1309.

[27] *King v Stevenson* (1971, CA7 Ill), 445 F 2d 565.

- ☞ Did the party offended by an untimely arbitration award indicate that a delay was unreasonable?

- ☞ Did the party offended by a delayed arbitration award tell the appraisers to stop working after the deadline passed?

In the case at bar, Petitioner met both prongs of this Seventh Circuit two-prong test:

№ 1 Facing Respondent's proposal for a delay, Petitioner, in writing, did "...insist that the arbitration in this matter conclude before the end of this month (February, 1990), as ordered by the court."[28]

№ 2 Petitioner, in writing, did advise the arbitrators on February 27th when it became obvious that -- given the requirement for a two day hearing -- the arbitration which had not yet begun could not *ipso facto* be concluded by February 28th.[29] Also, Petitioner immediately filed his Motion to Stay Arbitration[30] on February 27th.[31]

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[28] Joint Appendix, Sixth Circuit, p. 63.

[29] Joint Appendix, Sixth Circuit, p. 97.

[30] 9 USC § 3.

[31] Joint Appendix, Sixth Circuit, pp. 65-97.

By immediately objecting to a delayed award, and by moving to stay arbitration, Petitioner did all that the Seventh Circuit would have required him to do.

However, in this present case, Respondent did absolutely nothing: Respondent never filed a motion to compel arbitration as suggested by the federal Arbitration Act[32] and, instead, merely tried to protract the proceedings by requesting, at the 11th hour, more delay.[33]

5.2. CONFLICTING MICHIGAN LAW

The Sixth Circuit Court of Appeals has decided a federal question in a way which conflicts with the Michigan Supreme Court.

(a) Arbitral Agreement is Contract

The Michigan Supreme Court has held that arbitrators exceed their powers whenever they act beyond material terms of the contract from which they primarily draw their authority.[34]

At common law, grounds upon which courts may vacate an arbitration award include lack of jurisdiction in the arbitrator. The *Gavin* court noted that parties to an arbitration contract are not free to argue, implicitly or

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[32] 9 USC §4.

[33] Joint Appendix, Sixth Circuit, p. 62.

[34] *Detroit Auto. Inter-Insurance Exchange v Gavin* (1982) 416 Mich 407, 331 NW2d 418.

explicitly, that their dispute should be resolved in disregard of controlling principles of constitutional or statutory law, expecting courts to approve and enforce the result.

(b) 20 Day Deadline is Contractual

Michigan case law recognizes the principle that contractually-imposed deadlines *must* be honored by the courts.

At the turn of the century, the Michigan Supreme Court faced the issue of arbitral delay. The Michigan high court observed that delay must not be too long, must not be the fault of the parties, and the work done by the arbitrators preceding the making of the award must be substantial.[35] In the instant case:

- There was absolutely no work done by the arbitrators by the time the arbitration award deadline arrived.

- The passing of the award due date was attributable to Respondent who first requested "16 or more days advance notice" of any hearing and then failed to move to compel arbitration.

- The issuance of an arbitral award nearly six months *after* the award deadline was too long.

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[35] *Pinegree v. State Court of Mediation and Arbitration*, 130 Mich. 229, 89 N.W. 943 (1902).

- The six months delay was not the fault of Petitioner.

A party's failure to act within a prescribed arbitral time limit is a fatal jurisdictional flaw. For example, a contractually-imposed 20-day time limit (within which one must apply to vacate an arbitration award) must be complied with.[36] The Michigan Court of Appeals held that the court has no authority to vacate an arbitration award where the application is tardy when made after an agreed 20 day period expired.

5.3. DEPARTURE FROM COURSE

The Sixth Circuit Court of Appeals has departed far from the accepted and usual course of judicial proceedings (or has sanctioned such a departure by a lower court) as to call for an exercise of this Court's power of supervision.

(a) Contract Law Controls

The panel overlooked or misapprehended the basic black letter, hornbook law of contract as applied to arbitration agreements. The Circuit Court misinterpreted the parties' contractual language which provided that "[a]ny dispute, controversy, or claim arising out of this Agreement to Arbitrate, or the breach, termination, or invalidity thereof,

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[36] *Downing v Allstate Ins. Co.* (1982) 113 Mich App 96, 317 NW2d 302, vacated on other grounds 414 Mich 965, 27 NW2d 256.

shall be settled by this [District] Court, *as a matter of law* and upon motion."[37]

When a District Court is compelled by contract to settle a dispute as a *matter of law*, that District Court is powerless to *unilaterally* revoke a material term of an arbitration submission agreement (*e.g.*, the award deadline date) then direct a hearing by the arbitrators *after "...the time within which the agreement required the award to be made..." had expired!*

Such unilateral action by the District Court flies in the face of the federal Arbitration Act which, by analogy upon vacating an award, only enables the Court to order arbitration hearings provided that *"...the time within which the agreement requiring the award to be made has not expired."*[38]

(b) Common Law Honors Due Date

An arbitrator's authority finds its source in contract and, therefore, the general common-law rule was that an award not rendered within a party-established time limitation

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[37] Sixth Circuit Opinion, p. 3.

[38] 9 USC §10(e).

is void.[39] Legal commentators agree with the principle that...

> The general common law rule is that an arbitration award--not rendered within a party-established time limitation --is void.[40]

(c) States Honor Due Dates

The common law lesson of *Ash*[41] has been applied in other states, holding that a timely objection, before an award is issued, revokes jurisdiction and invalidates the arbitration award.[42] Prevailing authority is that, indeed, a party preserves the objection to jurisdiction by objecting before the arbitrator rules.[43]

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[39] *R.E. Bean Const. Co. v. Middlebury Associates*, 139 Vt. 200, 428 A.2d 306 (1980); *Librascope Inc., v. Precision Lodge No. 1600*, 189 Cal.App.2d 71, 10 Cal.Rptr. 795 (1961); *In re Broadway 40th Street Corp.*, 296 N.Y. 165, 71 N.E.2d 451 (1947).

[40] *Construction Arbitration*, §9:12.1, Supplement p. 69 (Lawyers Co-Op, 1991), by Thomas H. Oehmke.

[41] *Ash Apartments v Martinez* (1982, Colo App) 656 P2d 708).

[42] *Utility Trailer Sales, Inc. v Fake* (1987, Utah) 740 P2d 1327, 62 Utah Adv Rep 7.

[43] *Rum v Metropolitan Property & Liability Ins. Co.* (1986, RI) 508 A2d 672; *R. E. Bean Constr. Co.*, 139 Vt at 209, 428 A2d at 311-12; *Lent's, Inc. v Santa Fe Engineers, Inc.* (1981) 29 Wash App 257, 263-64, 628 P2d 488, 491-92).

(i) 5-day Deadline Upheld

A New York court upheld an extremely expeditious award due date, entering a stay of arbitration proceedings where it was violated.[44] The Court was faced with a "due date" provision in a written arbitration clause (that the award should be made within five days after appointment of a third arbitrator).

Mittelman held that a five-day, award deadline did not render that particular arbitration clause invalid and unworkable as a matter of law. Commenting on the rather abbreviated time period, specified by the parties in their submission agreement, *Mittelman* noted that one of the principal purposes of arbitration is to reach a *speedy* final result.

Another New York court held in *Rosario* that when an objection is raised before the award is rendered, the award cannot be confirmed but, rather, must be vacated.[45]

(ii) 60-day Deadline Upheld

In *Marsala*, despite a timely objection being made, an arbitration award was improperly issued: the Connecticut Supreme Court subsequently invalidated the arbitration award.[46]

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[44] *Joseph F. Mittelman Corp. v Murray L. Spies Corp.* (1954) 205 Misc 1017, 129 NYS2d 822.

[45] *Rosario v Carrasquillo* (1982, 1st Dept) 88 App Div 2d 874, 451 NYS2d 776.

[46] *Marsala v Value Corp. of America* (1969) 157 Conn 362, 254 A2d 469.

The parties in *Marsala* had agreed, in writing, that any arbitration award must be made within 60 days after the arbitrators started the hearing. The arbitrators failed to render an award before this contractually-imposed due date.

The Court held that where this requirement was contractually agreed to, but not expressly waived by the parties in writing, the 60-day requirement remained effective and a tardy arbitration award was legally ineffective.

Marsala held that an agreement for arbitration may contain special provisions (*i.e.*, award due date) covering the conduct of arbitration proceedings. Certainly, one can be compelled to arbitrate a dispute only if, to the extent that, and the manner in which, the parties have agreed. Parties must expressly agree, in writing, if they deviate from any previously-agreed special provision--such as an award due date! The untimely award was vacated.

5.4. IMPORTANT QUESTION OF LAW

The Sixth Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, and has decided a federal question in a way in conflict with applicable decisions of this Court.

(a) Federal Law Honors this Agreement

The federal Arbitration Act (FAA) addresses the validity, irrevocability and enforcement of agreements to arbitrate:

> *An agreement* in writing to submit to arbitration an existing controversy arising out of ... transaction [involving commerce] *shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation* of any contract [emphasis added].[47]

On the same subject matter, U.S. District Judge Newblatt (for the Eastern District of Michigan) held that the federal courts are empowered to set aside an arbitration award if the arbitrator disregards or modifies the plain and unambiguous provisions of a submission agreement,[48] such as a time limit.

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[47] 9 USC §2.

[48] *Schafer Bakeries, Inc. v Int'l Brotherhood of Teamsters, etc., Local 332* (1986, ED Mich), 650 F Supp 753.

(b) Circuit Court Disregards *Volt*

In the case at bar, the Circuit Court neither cited nor distinguished but, rather, overlooked and misapprehended this Court's recent holding which honored the parties' contractually-negotiated, governing law -- despite the federal-state law conflict which the arbitration contract engendered. The Circuit Court misplaced its reliance upon *Cone* [49] when, instead, the **Circuit Court should have relied upon *Volt*** [50] -- which Petitioner previously cited in both written and oral argument before the Circuit Court.

Volt upheld the sanctity of the arbitration contract. The U.S. Supreme Court held that even where the parties' contractual "choice of law" provision in an arbitration agreement engenders a state-federal law conflict, the contractually-chosen "governing law" provision controls. Thus, the parties can contractually agree to override otherwise prevailing law. The sanctity of the arbitration contract, as most recently recognized by the U.S. Supreme Court in *Volt*, should have directed this Sixth Circuit decision here, causing it to honor the parties' arbitration award deadline.

Even though urged at oral argument to read but one single case -- the *Volt* decision -- this Sixth Circuit Opinion failed to distinguish *Volt* from the case at bar, let alone indicate if it ever even considered *Volt*.

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[49] *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

[50] *Volt Information Sciences, Inc. v Board of Trustees* (1989), 109 SCt 1248, 103 LEd2d 488.

Just as the U.S. Supreme Court has upheld the supremacy of a "choice of law" provision in an arbitral agreement, there can be no doubt that an expressly stated, arbitration award due date (as we have here) must similarly be enforced.

6. CONCLUSION

For the reasons discussed, this Court is asked to allow this Writ of Certiorari.

ROSS & OEHMKE 3 March 1992

Thomas H. Oehmke
Counsel of Record for Petitioner
148 South Gratiot, Suite 100
Mt. Clemens, MI 48043-7900
313.465.1313

Joan M. Brovins
Co-counsel for Petitioner
148 South Gratiot, Suite 100
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7. APPENDIX

These documents are contained in this Appendix:

PAGE

U.S. District Court

(a) Judgment (dated 16 Aug 1990).

Other Documents

(a) Letter to Arbitrators (dated 27 Feb 1990)
(b) Motion to Stay Arbitration (dated 27 Feb 1990)
(c) Opinion of Arbitrators (dated 10 August 1990)
(d) Motion to Vacate Award (dated 23 October 1990)

Court of Appeals Documents

(a) Opinion (dated 13 Dec 1991)
(b) En Banc Decision (dated 27 Jan 1990)

7.1. U.S. District Court

(a) Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TERRY L. FREED,
Plaintiff,

Civil Action No.
89-CV-70643-DT

VS.

HON. BERNARD A. FRIEDMAN THOMAS H. OEHMKE,
Defendant.

FINAL JUDGMENT

In accordance with the opinion of Arbitrators submitted in this matter on August 10, 1990, judgment is hereby entered in favor of plaintiff, and against defendant, in the amount of $47,572.83, and such other costs and attorney fees as are allowed by law.

Approved:

Bernard A. Friedman
UNITED STATES DISTRICT JUDGE

7.2. Other Documents

(a) Letter to Arbitrators

George J. Fulkerson, Esq.
801 W. Big Beaver, Suite 500
Troy, MI 48084

Dear Attorney Fulkerson:

Thank you for your good efforts in agreeing to serve as chairperson of the arbitration panel and in attempting to expedite these proceedings. However, today is the last day in which the arbitrators have any authority or jurisdiction to render an opinion and award. After today's date, the arbitration panel is powerless to act.

For these reasons, I have filed today, with the Federal Court, a Motion to Stay Arbitration and to Dismiss the Complaint. I will favor you with a copy by ordinary mail. Because of this, I ask you to adjourn the prehearing conference scheduled today, with the understanding that no dates have yet been selected for our two-day hearing.

Please stop any further proceedings and take no further action after this ' date unless the parties agree in writing or the Court orders you to do so. I have, this date, advised Attorney Moffett that I will not be attending the prehearing conference.

Sincerely,

ROSS & OEHMKE

Thomas Oehmke

cc: H. Walker
Bruce Sage
Dennis Moffett

(b) Motion to Stay Arbitration (dated 27 Feb 1990)

U.S. District Court, Eastern District of michigan
Southern Division at Detroit

Terry L. Freed
Plaintiff,

Case No. 89-CV-70643

vs.

Hon. Bernard A. Friedman
District Judge

Thomas H. Oehmke
Defendant.

MOTION TO STAY ARBITRATION
AND TO DISMISS COMPLAINT
SUPPORTING BRIEF
NOTICE OF HEARING
PROOF OF SERVICE

Grounds for Court's Jurisdiction

Defendant requests this Court to stay arbitration because, as a matter of contract, after February 27th, the arbitrators have no authority and lack jurisdiction to issue any award; accordingly, as this matter has been removed from the Court's jurisdiction (except to administer the arbitration proceeding), Defendant asks the Court to dismiss the Complaint. In support, the following representations are made:

Jurisdiction and Venue

1. Jurisdiction is founded upon a federal question arising under the U.S. Arbitration Act [9 USC 1 et seq.] and the complete diversity of citizenship as between both parties.

2. This Motion is timely brought.

3. Venue is proper here because this is the Court which ordered the dispute to arbitration under a contractual submission agreement of the parties, subsequently entered as an order of the Court.

4. Under 9 USC 2, this Court has jurisdiction to determine the validity, irrevocability, and enforceability (upon such grounds as exist at law or in equity for the revocation of any contract) of a written agreement to submit to arbitration an existing controversy (arising out of a maritime transaction or a transaction involving commerce).

5. But for the alleged arbitration agreement, this Court would have civil jurisdiction under applicable law, in a civil action or in admiralty, of the subject matter of a suit arising out of the controversy between the parties.

Arbitration Agreement

6. The parties have agreed, in writing, to arbitrate a certain controversy.

7. Such agreement is valid, except for the fact that the arbitrators now lack jurisdiction to determine the dispute because the award was not rendered "before February 28th," as the parties
had contractually agreed.

8. The making of this arbitration agreement **is** not at issue.

9. Defendant is not in default in proceeding with such arbitration and has not failed, neglected, or refused to **arbitrate** under the Order Submitting Dispute to Arbitration.

10. Plaintiff is culpable for allowing this proceeding the languish over the past 60 days. If matters were proceeding too slowly, Plaintiff could have filed a motion to compel arbitration.

Relief Requested

Defendant prays for:

(A) The Court to proceed summarily to determine that the Order Submitting Dispute to Arbitration is no longer valid by operation of time, since no hearings were held by 30 January 1990 and because the opinion and award were not rendered before 28 February 1990, thereby depriving the arbitration panel of any jurisdiction.

(B) Costs and attorney fees for Plaintiff's failure to prosecute this arbitration.

(C) Such other relief as the Court deems-equitable.

Dated: 27 Feb 1990

_____

Thomas H. Oehmke
Defendant in Pro Per

Affidavit
Verification of Pleading

In Macomb County, Michigan, Thomas H. Oehmke, Affiant, makes this oath or affirmation and, being duly sworn, deposes and says [under MCR 2.114] that:

1. As the Defendant, I have knowledge of the facts pleaded.

2. If called to testify in Court, I would be competent to testify to the matters stated therein.

3. I have read the above Motion and the statements contained in such Motion are stated positively or on

3. I have read the above Motion and the statements contained in such Motion are stated positively or on information and belief according to the facts; moreover, such motion is not interposed for delay.

Mandatory Time Limit

4. Time was of the essence when I agreed to the date of 28 February 1990, before which time the arbitrators must have rendered their award; I considered this a mandatory time limit, within which the award must have been rendered.

5. If this outside date (of 28 February 1990) had not been agreed upon by the Court and both parties, then I would not have agreed to arbitration but, rather, would have insisted on the firm trial date in January, 1990.

Prejudice by Delay

6. This delay after 28 February 1990 will cause me irreparable harm. For example:

(a) I have stalled merger negotiations with a prominent Detroit corporate-litigator (who threatens to leave a named firm and relocate his practice in Mount Clemens) because this case is not resolved and adjudication is still pending; and,

(b) I have refused a bank mortgage with First National Bank of Mount Clemens (FNB) to refinance our home (from an 11% land contract to a 10% mortgage) because I do not wish to disclose the unresolved nature of this pending litigation to FNB--for which I also perform legal work.

(c) As a sole practitioner, I have had to reject renewing a referral relationship with the Macomb County Bar Association for lack of malpractice insurance (since I cannot obtain a reasonable rate while this litigation is pending).

(d) Our firm has been in non-compliance with the malpractice insurance requirements placed upon the firm by a major legal services referral plan because of this continuing litigation.

(e) Our firm has been unable to apply to a different legal services plan because we cannot produce a legal malpractice policy.

(f) The lack of malpractice coverage jeopardizes our pending bid for a major hospital contract as outside corporate labor relations counsel.

(g) I cannot complete the financing required for several major projects because of the pending nature of this litigation; such project include LawForms, BoatTown Yogurt, and LawVideo.

(h) This continuance of this litigation preoccupies myself and my support staff in continued, ongoing, seemingly never-ending preparation for the adjudication date.

(i) The unresolved nature of this matter continues to tarnish my professional reputation--as I continue to have a legal malpractice case pending.

4. I declare under penalty of contempt of court that to the best of my knowledge, information, and belief there is good ground to support the contents of such pleadings.

_____
Thomas H. Oehmke
Affiant

Subscribed and sworn to before me on 27 Feb 1990.

_____
Phyllis G. Kopko
Notary Public'
Macomb County, Michigan
Commission Expires 12/30/90

(c) Opinion of Arbitrators

U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION AT DETROIT

TERRY L. FREED,
Plaintiff

VS.

Case No. 89-CV-70643
Hon. Bernard A. Friedman
District Judge

THOMAS H. OEHMKE,
Defendant

OPINION OF ARBITRATORS

The Arbitrators file herewith their Opinion, after having heard witnesses and considered Exhibits presented during two (2) full days of trial, and having received and considered Trial Briefs and Proposed Findings of Fact of attorneys for respective parties.

FINDINGS OF FACT

Plaintiff seeks recovery of damages against Defendant Attorney for acts of alleged negligence in handling of two separate law suits: Silver, et al. vs. Freed, et al., Oakland County Circuit Court Case No. 83 263718 CZ [balance due under a stock redemption agreement], and Freed vs. Silver, et al., U. S. District Court for Eastern District of Michigan, Case No. 85-5479 [benefits under pension and profit sharing plans].

The Arbitrators make the following findings:

1. It is not disputed that an attorney-client relationship existed.

2. Defendant was negligent in protecting rights of Plaintiff in a stock redemption agreement involving a corporation and an individual, Silver. The acts of negligence consisted of:

(a) Failure to assess the prospects of obtaining a judgment and of collection in undertaking Freed's claim for monies due under the stock redemption agreement and to advise Freed of the risks and the advisability of giving serious consideration to the proposed settlement set forth in the June 23, 1983 letter of Silver's attorney, Plaintiff's Trial Exhibit 2, when Defendant had ample warning as to the financial difficulties of both the corporation and Silver and their contention that the agreement was void.

(b) Failure to plead by way of defense, counterclaim or cross-complaint all legal rights of Plaintiff in a stock redemption agreement involving a corporation and an individual, Silver, where the latter had sued Freed to have the stock redemption agreement declared void. Defendant failed to assert or preserve Freed's rights, independent of the stock redemption agreement, against the corporation and Silver before and after Freed obtained a judicial ruling that the stock redemption agreement was invalid.

(c) Failure to communicate with Plaintiff about hearings before Judge Gage and to obtain consent of Plaintiff for entry of Order of Dismissal which ended rights of Plaintiff in stock redemption agreement and against Corporation and individual, Silver.

3. The acts of negligence were proximate cause of an injury, i.e., loss by Plaintiff of right to recover either balance due under stock redemption agreement or pursue rights in corporation and against individual, Silver.

4. Plaintiff suffered injury of Ten Thousand Dollars ($10,000.00), which the Arbitrators find was the amount offered in settlement on June 21, 1983 by Silver's attorney to Defendant, Plaintiff Is Trial Exhibit 2, which the Arbitrators find was an amount likely to be recovered from corporation and Silver and the settlement should have been consummated by August 1, 1983. As further damages, Plaintiff is entitled to interest at 5% per annum under MCL 438.31, et seq., from August 1, 1983 to February 27, 1989, and the variable rate under MCL 600.6013 from February 27, 1989 when instant case was filed.

5. Plaintiff's damages flowing from Silver, et al vs. Freed, are $14,601.40, calculated to August 1, 1990 as follows:

Principal $10,000.00
5% simple interest, 8/1/83-2/27/89 2,786.99

Total $12,786.99

Statutory interest on $12,328.66:
10-005%, 2/27/89-7/1/89 $440.47
10.105%, 7/1/89-1/1/90 646.06
9.015%, 1/1/90-2/27/90 180.02
$1,266.55

Total $14,053.54

Statutory interest on $14,053.54:	
9.015%, 2/2790-7/1/90	$436.19
9.535%, 7/1/90-8/1/90	111.67
	$547.86
Total	$14,601.40

B. FREED vs SILVER, ET AL.

The Arbitrators make the following findings:

1. It is not disputed that an attorney-client relationship existed.
2. Defendant was negligent in protecting rights of Plaintiff in pension and profit sharing plans, acts of negligence consisting of:

A. Failure to timely file suit and plead Federal jurisdictional requirements.

B. Failure to add Merrill-Lynch, Custodian of funds, as Defendant, to keep funds sequestered during suit.

C. Allowing expiration of injunction, which had restrained Merrill-Lynch, so that individual, Silver, withdrew $25,829.00 on October 14, 1986, and was uncollectible thereafter in bankruptcy proceedings.

3. The acts of negligence were proximate cause of an injury, i.e., loss on October 14, 1986 of $25,829.00 claimed by Plaintiff in pension and profit sharing plans.

4. Plaintiff suffered injury on October 14, 1986 of Twenty-five Thousand Eight Hundred Twenty-nine Dollars

($25,829.00), which the Arbitrators find was the amount likely to be recovered from the pension and profit sharing plans. As further damages, Plaintiff is entitled to interest on that amount of 5% per annum under MCL 438.31, et seq., from October 14, 1986 to February 27, 1989, and the variable rate under MCL 600.6013 from February 1989 when the instant case was filed.

5. Plaintiff's damages flowing from Freed vs. Silver, et al., are $32,971.43, calculated to August 1, 1990 as follows:

Principal	$25,829.00
5% simple interest 10/14/86-2/27/89	$3,059.38
	$28,888.38

Statutory interest on $28,888.38:

10.005%, 2/27/89-7/1/89	$ 987.18
10.105%, 7/1/89-1/1/90	1,459.59
9.015%, 1/1/90-2/27/90	406.70
	$2,853.47

Total	$31,741.85

Statutory interest on $31,741.85:

9.015%, 2/27/90-8/1/90	$977.36
9.535%, 7/1/90-8/1/90	252.22
	$1,229.58

Total	$32,971.43

C. JUDGMENT

The Arbitrators award Plaintiff a Judgment of $47,572.83 against Defendant, and such other costs and attorney fees as are allowed by law.
Dated: August 10, 1990

ARBITRATORS

George J. Fulkerson
Bruce J. Sage
Harvey D. Walker

10 August 1990

(d) Motion to Vacate Award

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TERRY L. FREED,
Plaintiff,

Case No. 89-CV-70643-DT
Hon. Bernard A. Friedman
District Judge

THOMAS H. OEHMKE,
Defendant.

DEFENDANT'S ANSWER TO PLAINTIFF'S ORAL MOTION TO CONFIRM THE AWARD OF ARBITRATORS INCORPORATING COUNTER-MOTION TO VACATE AWARD and SUPPORTING BRIEF

Previously, the Court *sua sponte* entered a Judgment confirming the arbitrator's Award. Defendant brought a motion to set aside that judgment and at a motion hearing (on 4 October 1990) the Court set aside its order confirming the arbitration award.

Subsequently at the same motion hearing, the Plaintiff made an oral motion (presumably under 9 USC 9) to confirm the Award of the arbitrators; the Defendant objected and the Court allowed the Defendant 10 days to file those objections in writing.

In essence, these objections constitute a Counter-Motion to Vacate the Award and should be construed as such.

The award should be vacated because:

1. The arbitrators did not issue their award within the time time limit provided for in the arbitration submission agreement, adopted as an order of this Court.

2. The arbitrators admitted illegal, wiretapped evidence.

3. On its face, the award did not address Defendant's counterclaim.

This notice of a motion to vacate is timely filed [under 9 USC 12] because it is brought within three months after the Award is filed or delivered.

SUPPORTING BRIEF
Controlling Question

Whether this Court should vacate the arbitral award?

Brief

The Federal Arbitration Act provides certain grounds for vacation of an Award.

Award Silent as to Counterclaim, Contingency Fee

An Award of the arbitrators may be vacated:

> ... where the arbitrators were guilty of ... any other misbehavior by which the rights of any party have been prejudiced [9 USC 10(c)].

This applies here because the arbitrators issued an Award which was absolutely silent with regard to the counterclaim of the Defendant. Additionally, on its face, the arbitration award did not reduce the Plaintiff's damages by costs and one-third contingent fee under which any damages would recovered would have to be reduced.

After the award was rendered, the arbitrators explained their Award (for which there is no provision in the FAA) by saying that they had fully considered the counter-claim. Interestingly, the arbitrators ignored the need for a remittitur, thus, subtracting from the award the costs and attorney fees which were deductible under the contingency fee agreement between these parties.

The court cannot look beyond the four corners of the Award to examine whether or not a counterclaim was treated. An examination
of the Award shows that there was no mention of either the counterclaim or the reduction of the award to account for costs and the one-third contingent fee. The award should be vacated because of this inherent prejudice to Defendant; certainly, the arbitrators have only addressed Plaintiff's claim, ignoring the counterclaims and offsets affordable to Defendant under the parties' contingent fee agreement.

Hearing Conducted After Arbitral Authority Expired

An Award may be vacated:

> ... where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite Award upon the subject matter submitted was not made [9 USC 10(d)].

The arbitrators here did exceed their powers by conducting an arbitration hearing after the time that the authority (granting them the power to conduct the very hearing in the first place) had expired.

The court adopted the stipulation of the parties in providing for this arbitration process and the parties specifically and definitely had agreed that the arbitration would be concluded by a date certain. In fact, the arbitration was not concluded until more than 1/2 year after this point in time--well beyond the juncture when the arbitrators were still in power to render an Award.

Unqualified Expert Allowed to Testify

The arbitrators Award should be set aside:

> ... where the arbitrators were guilty of ... any other misbehavior by which the rights of any party been prejudiced (9 USC 10(c)].

In this instance, the arbitration proceeding was conducted under the Federal Rules of Civil Procedure and the Federal Rules of Evidence. The arbitrators allowed

illegally obtained wiretap evidence to be introduced by Plaintiff and, additionally, allowed a so-called "expert witness" (e.g., Ralph Pezda) to testify.

Defendant relies on its previous motion regarding suppression of this expert's testimony.

As to the illegally-obtained wiretap evidence, it was proposed by Plaintiff and, ultimately, introduced into evidence. This illegal evidence tainted the entire proceeding. It was in the form of illegally-tape-recorded conversations between the parties, though without the knowledge or consent of Defendant.

Accordingly, the arbitrators were guilty of misbehavior by allowing such illegally-obtained wiretap evidence, and the testimony of Ralph Pezda who is not an expert, all in violation of 9 USC 10(d).

Certain Evidence Res Judicata

The arbitrators also issued an Award which failed to take into account this Court's *res* judicata of a prior matter. The arbitrators had agreed to accept certain evidence after the close of the hearings and before the case record was closed. The Defendant submitted a true copy of an order by the Federal Court ruling that the injunction that had been issued against Dr. Silver (preventing him from removing funds from the Merrill Lynch account) had been acknowledged, recognized and reaffirmed.

This true copy of the order was submitted to the arbitrators who in turn ignored the comport of the Award finding to the contrary that there was malpractice which

included, in some part, the alleged failure of defendant not to have secured a continuance of that injunctive order.

Relief

This court should vacate the award, refusing to reduce it to judgment, and disallow the arbitrators from further action (as they lack any authority under the stipulated order submitting this dispute to arbitration.

ROSS & OEHMKE October 12, 1990

Thomas Oehmke

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TERRY L. FREED,
Plaintiff,

VS.

Case No. 89-CV-70643-DT
Hon. Bernard A. Friedman
District Judge

THOMAS H. OEHMKE,
Defendant.

DEFENDANT'S ANSWER
TO PLAINTIFF'S ORAL MOTION
TO CONFIRM THE AWARD OF ARBITRATORS
INCORPORATING
COUNTER-MOTION TO VACATE AWARD
and
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SUPPORTING BRIEF

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After the award was rendered, the arbitrators explained their Award (for which there is no provision in the FAA) by saying that they had fully considered the counter-claim. Interestingly, the arbitrators ignored the need for a remittitur, thus, subtracting from the award the costs and attorney fees which were deductible under the contingency fee agreement between these parties.

The court cannot look beyond the four corners of the Award to examine whether or not a counterclaim was treated. An examination of the Award shows that there was no mention of either the counterclaim or the reduction of the award to account for costs and the one-third contingent fee. The award should be vacated because of this inherent prejudice to Defendant; certainly, the arbitrators have only addressed Plaintiff's claim, ignoring the counterclaims and offsets affordable to Defendant under the parties' contingent fee agreement.

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authority (granting them the power to conduct the very hearing in the first place) had expired.

The court adopted the stipulation of the parties in providing for this arbitration process and the parties specifically and definitely had agreed that the arbitration would be concluded by a date certain. In fact, the arbitration was not concluded until more than 1/2 year after this point in time--well beyond the juncture when the arbitrators were still in power to render an Award.

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The arbitrators Award should be set aside:

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This true copy of the order was submitted to the arbitrators who in turn ignored the comport of the Award finding to the contrary that there was malpractice which included, in some part, the alleged failure of defendant not to have secured a continuance of that injunctive order.

Relief

This court should vacate the award, refusing to reduce it to judgment, and disallow the arbitrators from further action (as they lack any authority under the stipulated order submitting this dispute to arbitration.

ROSS & OEHMKE October 12, 1990

Thomas Oehmke

7.3. Court of Appeals Documents

(a) Opinion

Nos. 91-1168/70

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRY L. FREED,
Plaintiff-Appellee/Cross-Appellant,

v.

THOMAS H. OEHMKE
Defendant-Appellant/Cross-Appellee,

Decided and Filed 13 December 1991

BEFORE: NELSON and SUHRHEINRICH, Circuit Judges; and ENGEL, Senior Circuit Judge.

PER CURIAM. This is an appeal from a judgment entered on an arbitration award. The award was not made until some months after a deadline set by the court and agreed to by the parties, and the appellant contends that the delay rendered the award invalid. We disagree, and we shall affirm the judgment.

I

In February of 1989 plaintiff Terry L Freed, a citizen of Idaho, filed a legal malpractice action against his former attorney, Thomas H. Oehmke, a citizen of Michigan. The case was brought in the United States District Court for the Eastern District of Michigan, and it was referred to a

mediation panel pursuant to Local Rule 32 of that jurisdiction. The panel recommended that Oehmke pay Freed $15,000 to settle the case. Mr. Freed accepted the panel's recommendation, but Mr. Oehmke rejected it.

A final pretrial conference was held on January 2, 1990, at which time District Judge Bernard A. Friedman urged the parties to submit their dispute to arbitration. He emphasized that the arbitration would be conducted on an expedited basis, which would save time and money. The parties accepted the court's suggestion, and on January 8, 1990, the court issued an order referring the case to binding arbitration. The order said that the arbitration hearing would be held no later than January 30, and that the arbitrators' decision would be issued no later than February 28, 1990.

On January 16th the court issued an order adopting an agreement signed by the litigants submitting the dispute to arbitration. The agreement said, among other things, that the "arbitrators shall issue a written opinion and award before 28 February 1990;" that the parties were bound by "ail prior orders of th[e] court;" and that "[a]ny dispute, controversy, or claim arising out of or relating to this Agreement to Arbitrate, or the breach, termination, or invalidity thereof shall be settled by this Court, as a matter of law and upon motion."

By January 17th the parties had agreed on the composition of a three-member arbitration panel. The neutral arbitrator took no action for several weeks, and Judge Friedman wrote to him on February 7th to ask that he "proceed to conduct a hearing as expeditiously as possible to satisfy the time requirements of the parties and the order of this court."

The arbitrator appointed by Mr. Oehmke resigned due to illness on February 7th. He was replaced on February 16th.

Meanwhile, in response to a request by Mr. Freed that he be given at least 16 days advance notice before the scheduling of any hearings, Mr. Oehmke wrote to Freed's attorney insisting "that the arbitration in this
matter conclude before the end of this month (February, 1990), as ordered by the court."

The arbitrators scheduled a final pretrial conference for February 21st, but the neutral arbitrator unilaterally rescheduled it for the 27th. Realizing that the arbitration could not possibly be concluded on schedule, Mr. Oehmke did not attend the conference. Instead, he filed a motion in the district court seeking a stay of arbitration on the ground that the authority of the arbitrators had expired. The court denied Mr. Oehmke's motion, noting that the arbitration agreement did not provide that time was of the essence and pointing out that the delay was due to circumstances beyond the control of the parties.

The arbitration process then went forward, with hearings being held on May 18 and 19, 1990. On August 10, 1990, the arbitrators issued an opinion awarding Mr. Freed $47,572.83. Mr. Oehmke moved to vacate the award, but the district court denied the motion and entered judgment on the award. Mr. Freed filed a Motion to Assess and Tax Mediation Sanctions pursuant to Local Rule 32(j), asking for an additional $7,887.50 in non-attorney fee costs. The motion was denied. Mr. Oehmke appealed from the judgment, and Mr. Freed cross-appeals from the denial of sanctions.

II

Mr. Oehmke argues that the district court lost jurisdiction over the case when it referred the matter to arbitration. The arbitrators had authority to act only until February 28, 1990, he contends, and when that deadline

passed, the arbitrators' authority expired and Mr. Freed lost the opportunity to litigate his claim.

We do not believe that the district court was without jurisdiction to decide the dispute that arose out of the arbitrators' failure to complete their work on time. The order referring the case to arbitration expressly provided that "[a]ny dispute, controversy, or claim arising out of or relating to this Agreement to Arbitrate, or the breach, termination, or invalidity thereof shall be settled by this Court, as a matter of law and upon motion."

The district court did not err in allowing the arbitration process to continue past February 28th. In disputes over the scope of an arbitration agreement, "a court must recognize a strong presumption in favor of arbitrability." *Matter of Arbitration No. AAA13-161-0511-85,* 867 F.2d 130, 133 (2d Cir. 1989). Moreover, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis supplied).

It is true that the arbitration agreement adopted by the district court's order stated that "[tlhe arbitrators shall issue a written opinion and award before 28 February 1990," but it is also true that the arbitration agreement did not say that time was of the essence. Nothing in the facts presented compels the conclusion that the February 28 date - which was initially suggested by the district court - was so central to the parties' undertaking that the entire agreement depended on it. The district court concluded, in effect, that the deadline was not meant to be mandatory, but "was a goal set to encourage prompt determination of the arbitrable issue." *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 265

(6th Cir. 1984). We cannot say that this conclusion was erroneous.

Even if the district court had declined to let the arbitration proceed, we see no basis at all for Mr. Oehmke's suggestion that the case would simply have been dismissed. The district court would have been required to try the case itself, and we have no way of knowing whether the court would have decided the case before the arbitrators did. Any prejudice by reason of delay appears purely conjectural.

III

Mr. Freed's cross-appeal argues that the district court erred in denying the arbitration costs that were sought as a mediation sanction pursuant to Local Court Rule 32(j). That rule provides that if the parties agree to mediation and one party rejects the mediator's recommendation, the other party is entitled to expanded costs if he ultimately recovers an award that is more than 10 percent higher than the mediator's recommendation.

The district court relied on *Tiedel v. Northwestern Michigan College*, 865 F.2d 88 (6th Cir. 1988), in holding that there was authority for imposing the sanction. Mr. Freed attempts to distinguish *Tiedel* on the ground that it dealt only with attorney fees. What *Tiedel* said, however, was this:

> If a general rule may be read in *Alyeska Pipe Line* and its progeny, it is that the Supreme Court will not allow itself or other federal courts to vary the uniform scheme of *costs and fees* as set forth in the 1853 Fee Act, other than those narrowly defined circumstances of cases involving bad faith or abusive litigation, disobedience of court orders or

the common fund doctrine." Id. at 93-94 (emphasis supplied).

The district court was correct in concluding that it had no authority to award the expanded costs sought by Mr. Freed.

AFFIRMED.

(b) En Banc Decision

Nos. 91-1168/70

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRY L. FREED,
Plaintiff-Appellee/Cross-Appellant,

v.

THOMAS H. OEHMKE,
Defendant-Appellant/Cross-Appellee,

BEFORE: NELSON and SUHRHEINRICH, Circuit Judges; and ENGEL, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TERRY L. FREED
Plaintiff,

No. 89-CV-70643-DT

vs. HON. BERNARD A. FRIEDMAN

THOMAS H. OEHMKE
Defendant.

_____/

ORDER

This matter having come before the court on all pending motions, a hearing having been held on January 2, 1990, counsel for all parties being present, the court otherwise being fully informed in the premises, for the reasons stated on the record, ***

IT IS FURTHER ORDERED that by January 5, 1990, the parties submit a stipulated order memorializing their agreement to submit this case to binding arbitration. **The arbitration hearing shall be held no later than January 30, 1990, and the arbitrators' decision shall be issued no later than February 28, 1990** [emphasis added].

SO ORDERED. January 8, 1990

BERNARD A. FRIEDMAN
U.S. District Judge

United States District Court
Eastern District of Michigan
Southern Division at Detroit

Terry L. Freed
Plaintiff,

Case No. 89-CV-70643-DT

vs.

Hon. Bernard A. Friedman
District Judge

Thomas H. Oehmke
Defendant.

ORDER
SUBMITTING DISPUTE TO ARBITRATION

At a session of this Court
held on January 16, 1990

PRESENT: Bernard A. Friedman
U.S. District Judge

The parties having stipulated below to this order, the Court hereby adopts the parties' agreement and adopts, by reference, as an order of this Court, the following agreement of the parties. As such, it is hereby ORDERED:

Parties

This case is submitted to final and binding arbitration under the federal Arbitration Act [9 USC 1 et seq.].

The only difference in how this case is processed henceforth is that two of the three arbitrators shall issue an award (as if the case were tried, with three arbitrators, instead of a bench or jury trial).

Applicable Disputes

The parties will submit to arbitration the case at bar, as the pleadings are presently structured, subject to all orders of this Court; however, the Court shall retain jurisdiction for proceedings in aid of arbitration (i.e., subpoenas) and for confirmation of the award.

Applicable Arbitration Rules

Except as modified by law or this Arbitration Agreement, the arbitration procedure will be administered under the Federal Rules of Civil Procedure.

An appeal (to the Court of Appeals for the Sixth Circuit and beyond) may be taken from any court order in this case, or subsequent order or award of the arbitrators, under the same terms and conditions as such order or award were made by the Court.

Administration of Arbitration

The arbitration shall be administered by this Court.

Appointing Authority

Three arbitrators shall serve and any order or award shall be upon vote of the three arbitrators.

Each party shall appoint a party-arbitrator who shall serve, after appointment, as a neutral. Each party shall bear the expenses of their own party arbitrator.

The two party arbitrators shall appoint a neutral arbitrator and, if they cannot agree, then the Court shall submit a list of names (from which the parties may strike names):

(a) those names not stricken shall be numbered, in order of preference (1 for the highest preference) and the arbitrator with the lowest combined score shall be selected; or,

(b) if their is no common name, then the Court shall appoint an arbitrator to serve as the neutral.

Neutral Arbitrator's Qualifications

The neutral arbitrator shall disclose any potential disqualifying matter or conflict of interest.

Each party shall be liable for one-half of the hourly fee (in an amount to be agreed), plus parking and mileage, if any, of the neutral arbitrator.

Arbitration hearings shall be held in sessions of no more than four hours per day.

Opinion and Award

The arbitrators shall issue a written opinion and award before 28 February 1990 [emphasis added].

Stipulation as to Locale

Any arbitration proceedings shall be held in the chambers of Judge Friedman at the U S. District Court in Detroit, with a court stenographer present to record the proceedings, unless the two parties otherwise mutually agree, the cost to shared equally by the parties.

Governing Law

Any controversy (arising under or in relation to this contract) shall be governed, and controlled by the federal Arbitration Act [9 USC 1 et seq.], except for review on appeal.

Choice of Forum

The parties consent to the personal jurisdiction and venue of this Court.

The parties shall seek the assistance of this Court only until an award has been confirmed. After confirmation, either party may seek whatever assistance is desired of any additional court otherwise having jurisdiction to enforce such award.

Any process, notice of motion, or other application to the Court or a Judge thereof may be served outside the State of Michigan by registered or certified mail or by personal service, provided thirty (30) days for appearance is allowed.

Relief or Remedies Available

The prevailing party in any arbitration will be entitled to whatever relief this Court would otherwise be empowered to award, whether equitable or legal in nature.

Record of Hearing

Either party may make arrangements for a record of the arbitration hearings.

Closed Hearing

The parties agree that all hearings shall be closed to the public.

Presentation of Case

The hearing dates (with eight hours of hearing) shall be set.

Plaintiff shall present his case on the first day and Defendant shall present his defense and counterclaim on the second day [emphasis added].

Evidence and Order of Court

The arbitrators shall be bound by the pleadings of this case, all prior orders of this Court, and the discovery which has occurred between the parties.

The arbitrators are bound to apply by the Federal Rules of Civil Procedure (FRCP) and the Federal Rules of Evidence (FRE).

Non-Disclosure Agreement

Both parties (and their agents, attorneys, servants, employees, contractors, and those under their direct control) shall maintain confidentiality and shall not disclose any information received about the other party or their business operations during the course of any arbitration proceeding.

Arbitration Clause

Any dispute, controversy, or claim arising out of or relating to this Agreement to arbitrate, or the breach, termination, or invalidity thereof, shall be settled by this Court, **as a matter of law** and upon motion [emphasis added].

_____

Bernard A. Friedman

Stipulated as to form and substance:

_____

Dennis Moffett
Attorney for Plaintiff

_____

Thomas Oehmke, Attorney
Defendant in Pro Per